Court stated that the master who puts the servant in a place to do the master's business, is responsible for what the servant does through lack of judgment, or discretion, or from infirmity of temper, or under the influence of passion, beyond the strict line of his duty or authority and inflicts an unjustifiable injury upon another. This reasoning was followed in *Cohen* v. *Dry Dock Co.* (1877), 60 N. Y. 170. The same line of argument was advanced in *Craker* v. *Chicago R. R.* (1875), 36 Wis. 657; and in the cases there cited, where the Court said that it would be cheap and superficial morality to allow one owing a duty to another, to commit the performance of this duty to a third person, and be exempt from responsibility for the malicious conduct of the substitute.

The reasoning in *Craker* v. *Chicago etc., R.R.* (1875), 36 Wis. 657; is well enforced by the case cited in the opinion. The same reasoning and doctrine were advanced in *Stewart* v. *Brooklyn, etc., R. R.* (1882), 90 N. Y. 588; which repudiates some earlier cases, among them *Isaac* v. *The Third Avenue R. R.* (1871), 47 N. Y. 122, and which follows *Goddard* v. *Grand Trunk R. R.* (1869), 57 Me. 202, and *Craker* v. *Chicago, etc., R. R.* (1875), 36 Wis. 657; and the line of cases advanced to support the doctrine stated by the writer. The argument advanced in *Isaacs* v. *The Third Avenue R. R.* (1871), 47 N. Y. 122, is the same as that found in *Parker* v. *Erie, etc., R. R.* (1875), 5 Hun. (N. Y.) 57; *Little M. R. R.* v. *Wetmore* (1869), 19 Ohio St. 110; *Ward* v. *Omnibus Co.* (1873), 42 L. J. C. P. 265; *Evansville* v. *Baum* (1866), 26 Ind. 70; *Great Western R. R.* v. *Miller* (1869), 19 Mich. 305; *Priest* v. *Hudson River R. R.* (1871), 40 How. Pr. (N. Y.) 456; *Johnson* v. *Chicago, etc., R. R.* (1882), 58 Iowa 348; and has not that weight of reason and logic in support which are contained in the other cases.

JNO. F. KELLY.

St. Paul, Minn.

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*Supreme Court of Texas.*

## INSURANCE CO. OF NORTH AMERICA

v.

## EASTON ET AL.

A warranty in a policy of fire insurance, that "this insurance shall not inure to the benefit of any carrier," does not contravene public policy, nor is it in restraint of trade.

Although a stipulation in a bill of lading, which gives the carrier the benefit of any insurance upon the goods carried, is valid, and, in case of loss, will defeat the insurer's right of subrogation, the insured, by entering into such a contract, forfeits all rights under a policy containing a warranty that the insurance shall not inure to the benefit of any carrier, nor can a carrier acquire any rights under such a policy.

It is immaterial, in such case, that the contract of insurance was made without the carrier's knowledge or privity.

Appeal from District Court, Galveston County.

Action by Nelson S. Easton and others, Receivers of the Houston & Texas Central Railway Company, against the Insurance Company of North America. Judgment for plaintiffs, and defendant appeals.

*Hume & Kleberg*, for appellant.
*Willie, Mott & Ballinger*, for appellees.

STAYTON, C. J., March 1, 1889. This case comes before us on an agreed statement, made from the record, and signed by counsel, which is as follows:

On the 22d day of June, 1885, appellant, a corporation having its domicile in the State of Pennsylvania, issued an open policy to Callender & Magnus, cotton buyers, residing in New York City. This policy was renewed September 1, 1886, for one year, subject to certain conditions and the following express warranty: "Warranted that this insurance shall not inure to the benefit of any carrier." Under the terms of the open policy all cotton purchased by Callender & Magnus, or by their agents for them, in the United States, was at once covered by the same as soon as purchased, they reporting as soon as practicable to the insurance company the particulars of the purchase, as to marks, value, amount of insurance desired, etc. The insurance company would then issue to Callender & Magnus a certificate of insurance, giving date from which insurance began, number of bales insured, amount of insurance, locality of cotton, and its intended route of shipment. But the insurance as such was complete under the said open policy as soon as the cotton was purchased, even before the certificate was issued; the certificate being only a statement giving the details of the particular transaction, such as value, amount insured, and route of shipment, but without in any manner altering or modifying the terms and conditions of the open policy, or the conditions and warranty contained in the aforesaid renewal thereof. The purpose of an open policy is convenience to the assured, and to insure his property from the very moment of its acquisition. This could not be done if he was required to make a separate contract for each lot of cotton which he may purchase in different parts of the country. The danger and risk which would necessarily intervene after the purchase is

made until insurance could be effected by special policy, would have to be borne by the owner. Upon the open policy, however, the owner is protected by the insurance upon all purchases, no matter where and when made, and though loss should occur before report of the purchase to the insurer, or issuance of the certificate of insurance. Premiums under the policy in this case were payable monthly upon amounts insured thereunder for that period.

On the 9th day of December, 1886, Callender & Magnus, by one of their agents, bought and became the owners of fifty bales of cotton at Mexia, Tex. The advice of this purchase reached the office of the appellant insurance company some time thereafter, and said company, on the 16th of said month, issued to Callender & Magnus a certificate of insurance. The certificate provides that it represented and took the place of the policy, and conveyed all the rights of the original policy-holder (for the purpose of collecting any loss or claim) as fully as if the property was covered by a special policy direct to the holder of the certificate, and the certificate was dated New York, December 16, 1886.

On the 11th day of December, 1886, Callender & Magnus, by their agents, delivered to appellees, who are common carriers, at the town of Mexia, Tex., to be shipped to Liverpool, England, the said fifty bales of cotton, and on the same day appellees delivered to the said agents of Callender & Magnus a bill of lading containing, among other things, the following provision—

"In case of any loss, detriment, or damage done to, or sustained by, any of the property herein receipted for during such transportation, whereby any legal liability shall or may be incurred, that company alone shall be answerable therefor in whose actual custody the same be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have full benefit of any insurance that may have been effected upon or on account of said cotton."

On the 12th day of December, 1886, while said cotton was in the custody of appellees, in their capacity as common carriers, forty bales thereof, of the value of $1,725.34, were totally destroyed by fire. The appellant was notified of the destruction of the cotton December 21, 1886. When the appellant issued the certificate of insurance to Callender & Magnus it

had no notice or knowledge of that clause in the bill of lading which provides that the carrier of said cotton shall have the benefit of any insurance which may have been effected upon or on account of said cotton. The fact that such clause was contained in said bill of lading was first brought to the knowledge of appellant when the bill of lading was presented to it, as one of the proofs of loss required, some time after the 21st of December, 1886. Appellees had no actual notice of the warranty in the policy stipulating that the insurance should not inure to the benefit of any carrier, and, being liable for the loss of the cotton as common carriers, paid the same, whereupon Callender & Magnus transferred to them the certificate of insurance. Appellant declined to pay the policy to Callender & Magnus because the same had been forfeited by their acceptance of the bill of lading. Appellant declining to pay for the loss, appellees, on the 27th of September, 1887, sued it in the District Court of Galveston county. That Court held the clause in the policy, providing that the instrument shall not inure to the benefit of any carrier, to be void, because in restraint of trade and against public policy, and rendered judgment for appellees for $1,725.34. From this judgment the Insurance Company of North America appeals, and the following questions of law, embraced in the assignments of error, are now by agreement respectfully submitted to this Court for its decision: (1) Is the warranty in the policy, which provides that the insurance shall not inure to the benefit of any carrier, a valid and lawful stipulation in the contract of insurance, and does a violation thereof forfeit the policy, or is said warranty in restraint of trade and contrary to public policy? (2) Under the particular facts of this case, irrespective of any rights which Callender & Magnus may have had under the contract of insurance, can appellees under the law recover against the appellant?

It must now be held that so much of the clause in the bill of lading as provided that "the carrier so liable shall have full benefit of any insurance that may have been effected upon or on account of said cotton," is not invalid by reason of its contravening any rule based on public policy: *Insurance Co.* v. *Railway Co.* (1885), 63 Tex. 475; *Insurance Co.* v. *Transportation Co.* (1886), 117 U. S. 312; *Inman* v. *Railway Co.* (1889),

129 U. S. 128; *Rintoul* v. *Railroad Co.* (1883), U. S. Circ. Ct., S. Dist. N. Y., 17 Fed. Repr. 905; *Platt* v. *Railroad Co.* (1888), 108 N. Y. 358; *Jackson Co.* v. *Insurance Co.* (1885), 139 Mass. 508. In the case first referred to, the bill of lading was prior, in point of time, to the policy, which recited the fact of shipment, and it was held that this was sufficient evidence that the policy was issued, with notice of the right secured by the carrier by contract, and in subordination to that right. The same ruling was made in the second case cited, in which it is assumed that the contracts of carriage and insurance were made simultaneously, the insurer being ignorant of the clause in the bill of lading which subrogated the carrier to the rights of shipper under the policy. In disposing of the case the Court said—

"The policy containing no express stipulation upon the subject, and there being no evidence of any fraudulent concealment or misrepresentation by the owner in obtaining the insurance, the existence of the stipulation between the owner and the carrier would have afforded no defense to an action on the policy, according to the careful judgments rendered in June last, and independently of each other,—the one by the English Court of Appeal, and the other by the Supreme Judicial Court of Massachusetts: *Tate* v. *Hyslop* (1885), L. R. 15 Q. B. Div. 368; *Jackson Co.* v. *Insurance Co.* (1885), 139 Mass. 508."

In *Inman* v. *Railway Co.*, *supra*, it appeared that the policy issued some time before the shipment was made, and, while recognizing the validity of a contract between the shipper and carrier, whereby the latter should become entitled to the benefit of insurance made by the former in a proper case, the Court said—

"The policies here were all taken out some weeks before the shipments were made, although, of course, they did not attach until then, and recovery upon neither of them could have been had, except upon condition of resort over against the carrier, any act of the owners to defeat which operated to cancel the liability of the insurers. They could not, therefore, be made available for the benefit of the carrier."

In *Jackson Co.* v. *Insurance Co.*, *supra*, it was assumed that the carrier might contract for the benefit of insurance secured by the shipper, and the inference to be drawn from the report of the case is, that the policy, made the basis of the action, was issued after the right of the carrier to the benefit of insurance had attached. The shipper bought through a broker, who it seems did not read the receipts securing to the carrier

the benefit of insurance. The railroad's receipt, with draft attached, was forwarded by the broker to the shipper, the draft cashed, notice given to the insurance company of the shipments, and the policy presented, that the shipment might be evidenced thereon, which was done. This seems to have been the act which applied the insurance to the cotton destroyed while in transit, and no inquiry was made as to the terms of shipment when insurance was thus obtained. In disposing of the case the Court said—

"That the contract between the plaintiff and the carrier was binding and valid being conceded, we are brought to the conclusion expressed in the ruling of the Judge who presided at the trial, 'that in a case where there was no intention to deprive the insurance company of its rights, and no intentional fraud and concealment, and where the plaintiff (shipper) was actually ignorant of the stipulation relied on at the time it made the insurance or obtained the indorsement on the policy, and was ignorant, when it ordered the cotton, that any such stipulation would be made, and there was no actual misrepresentation, an insurance company insuring property *in transitu*, making no provision in regard to the nature of the contract of carriage, and not requesting to see the bill of lading or receipt, and making no inquiries about them, must be held to have insured it under and subject to the actual contract of carriage, so far as it was a lawful contract.'"

Under this state of facts it was held that the carrier, by virtue of its contract, became subrogated to all rights held by the shipper against the insurer; and that thus was defeated the right of the insurer to be subrogated, on payment of the loss, to the right against the carrier, to which, but for the contract of shipment, the insurer, under the settled principles of law, would have been entitled. This case, while holding that the right of the insured, when dependent only on his relation to the carrier, to modify by contract the rule of subrogation, cannot be questioned, concedes that no contract made between the insured and the insurer, whereby the right to modify the general rule of subrogation is withdrawn from the insured, can be controlled by a contract between the insured and the the carrier.

In *Insurance Co.* v. *Calebs* (1859), 20 N. Y. 175, it was held that a contract between a carrier and shipper, substantially such as is set up in this case, was valid; and on payment of a loss under a policy issued after the contract for carriage was made, the right of subrogation was denied to the insurer. In disposing of the case the Court said—

"It is argued that this clause in the contract did not exempt the carriers from liability to the plaintiffs, because it was made without their knowledge or consent, and was an attempted fraud upon their rights. But this is not so in point of fact, so far as the defendants are concerned. The contract between them and the insured was made before any insurance was obtained; and though it sought to secure a right to the defendants in case policies were procured, yet on their part no fraud was contemplated on the plaintiffs,—none is found by the Court. It is true the case states that the plaintiffs did not know of the contract when they issued their policies. That was a matter between them and the insured. If there was any fraudulent concealment of facts on the part of the latter at the time they obtained their insurances, it would have avoided the policies, and they would not have been bound to pay the loss. If they paid it voluntarily, they are not entitled to be subrogated."

In this case, as in the others, but one, considered, there was no contract between the insured and insurer, at the time the contract between the carrier and the insured was made, which restrained them from modifying or entirely annulling the ordinary rule of subrogation if they saw proper to do so by contract.

The cases referred to hold: (1) That contracts, such as contained in the carrier's contract before us, are valid as between the carrier and shipper. (2) That a policy issued with knowledge that the insured property is in transit, in the absence of inquiry as to the terms of shipment, misrepresentation as to this or other matter material to the risk, or fraud, will be deemed to have been issued in subordination to the contract of shipment, which may control the right of the insurer to subrogation. None of them, however, hold that a contract of insurance, existing when a contract of carriage is made, whether the carrier have knowledge of the insurance contract or not, can be controlled by a subsequent contract between the insured and the carrier, and the insurer's right to subrogation thus be destroyed, even when there is no express provision in the policy which forbids this. It must be that, in the absence of stipulation in a policy to the contrary, the insured may, without invalidating his policy, make such contracts with a carrier, limiting the liability of the latter, as may be lawful under the laws in force at the place of shipment, or such other laws as may be applicable; for the parties ought to be presumed to contract with reference to the right of the carrier to refuse to receive and transport freight

without contract, limiting his liability in so far as this may lawfully be done under the law governing the shipment. With the carrier's liability lawfully restricted by contract, a loss resulting from a cause within the restriction would not give right of action in favor of the insured shipper against the carrier; and where this is the case there can be no subrogation under the general principles applicable to the subject.

The contract relied on by the carrier in this case was not one it had the right to have made, or otherwise the right to refuse to receive cotton for transportation; and it ought not to be presumed that the parties to the insurance contract contemplated that the affreightment would be made practically at the entire risk of the insurer, when the carrier had no right to insist that this should be so, and when the general rules of law, with reference to which they ought to be presumed to have contracted, fix on the carrier the ultimate liability for a loss occurring while the freight is in his hands, unless the loss arises from a cause that relieves the carrier from liability. The carrier's liability is held to be the ultimate liability, simply because the loss of property, while in his custody as carrier, results in fact or in legal contemplation from his failure of duty, while that of the insurer is held to be that only of an indemnitor, in all cases in which the insurance contract does not stipulate to the contrary, or in which a contrary instruction may not fairly be inferred from the time and circumstances of the contract. It seems to us, under the facts of this case, leaving out of consideration the warranty contained in the contract of insurance, that the right of the insurer to subrogation on payment of the loss is as well secured when there is not, as well as when there is, an express contract that the right to subrogation shall exist; and that a contract between the insured and the carrier which defeats this right would defeat the right of the insured or the carrier to recover at all upon the contract of insurance. It has been held that, where a policy expressly gives the insurer the right to subrogation against the carrier, a subsequent agreement between the insured and the carrier that the latter shall be subrogated to the right of the insured avoids the policy: *Carstairs* v. *Insurance Co.* (1883), U. S. Circ. Ct., Dist. Md., 18 Fed. Repr. 473. The correctness

of this ruling was recognized in *Jackson Co.* v. *Insurance Co.* (1885), 139 Mass. 511. If the insured wishes insurance that will place the ultimate liability on the insurer, let him so make his contract as to protect the carrier afterwards to be selected by them; compensate the insurer for the increased risk of ultimate loss; and be in position to contract with the carrier for reduction in freight, such as may be proper by reason of this shifting of the ultimate risk of loss from the carrier to the insurer.

Passing from this, however, it is certainly true that the insured could not confer on the carrier a right he did not possess. The warranty which the insurance company seeks to assert to avoid liability to the carrier was one promissory in character, in which the parties contracted "that this insurance shall not inure to the benefit of any carrier." This, if a valid provision, cuts off any construction of the policy whereby it could possibly be held to confer any right to benefit under it on a carrier of the property insured, and it deprives the insured of the power to confer on such carrier any right to benefit under the policy by contract or otherwise. By the warranty we understand the parties to have contracted that the contract of insurance should be avoided—should cease to be operative—if during the time specified for its continuance the insured should so contract with a carrier of the property insured as, between themselves, to give to the carrier any right to benefit under the policy. The purpose of this provision evidently was to deny, in terms, to the insured the right of power to confer on the carrier any right to benefit through the policy, such as the cases to which we have referred hold may be conferred on the carrier by contract with the shipper made before insurance is obtained. The insurer, in effect, says in the face of the policy,—and to this the insured assents—

"This contract shall be binding on me only so long as you refrain from contracting with any carrier you may employ to transport the insured property that he shall have right to any indemnity from me for loss occurring, while the property is in his possession as carrier, from a cause which, under the rules of law applicable to the contract of carriage, would give you cause of action against such carrier; and I will not be longer bound by this contract if you in any manner release such carrier from that full liability to you and to me which will exist under a lawful contract of affreightment for loss of the insured property while in his hands as carrier."

By requiring the carrier's liability to continue the ultimate liability, the insurer doubtless intended to make the carrier's own interest some guaranty against its own negligence or misconduct. In the very act of making the contract through which the carrier in this case claims, the policy ceased to be of any effect whatever, as to the particular cotton at least, and from that time forward neither the insured nor the carrier could assert a right under it, based on the particular loss, if the warranty was valid.

The Court below held that the warranty was invalid, because in restriction of trade, and against public policy. The insurance company was under no legal obligation to issue a policy at all, but, if it did, it had the right to place a provision in the policy such as it did, and in so doing it neither contravened any public policy nor restrained trade. It is said that the carrier had no notice of the clause in the policy now relied upon, and that for this reason it would be contrary to public policy to permit it now to rely upon the warranty. The law does not require that notice shall be given to third persons of contracts of insurance, nor does it provide a mode in which such notice may be given whereby all persons will be bound. If the want of notice of a contract become important in a contest between a party to it and a third person, who has sought to acquire by contract an interest or right antagonistic to the right the former contract gives, it is not because the former contract was illegal, but because some equitable consideration has arisen on account of which the person who has kept secret his right ought not to be permitted to assert it against one whom he has misled by his silence. If the mere want of notice of contracts would place them on the list of contracts condemned because contrary to public policy, then there would be a long list of condemned contracts, not heretofore even suspected of illegality. The carrier knew that no right could be acquired against the insurer through a contract with the insured other than the latter possessed and had power to convey, and if it desired to know the extent of that right it was its duty to inquire. Appellee makes this inquiry: "Could the insurance company and the owner of the cotton, without the knowledge or privity of the carrier, make a contract be-

tween themselves by which the carrier would be deprived of its well-recognized legal rights? Is not such a restriction against public policy, and in restraint of trade?" Neither the knowledge of nor privity of the carrier to the insurance contract was necessary to its legality. The carrier had no legal right, recognized or unrecognized, to have the insurance company or the insured to make any contract of insurance whatever, much less to make one the insurance company was under no obligation to make, and had refused to make. The terms of the policy neither restrained appellee nor any other carrier from making lawful contracts for carriage at any place, nor from carrying them out anywhere; they simply denied to the insured the right to make a contract which would bind the insurer as the carrier desired it to be bound.

Two further inquiries and suggestions are made by appellee: "Then, knowing the law,—knowing that the carrier had the right to stipulate for the benefit of any insurance that may have been effected,—knowing that the shipper could not refuse to accept from the carrier a bill of lading with that provision,—will appellant be permitted to receive premiums, and at the same time insert a clause in its policy of insurance which would exonerate it from the payment of any loss?" "Appellant refused to pay the policy to Callender & Magnus because the same had been forfeited by their acceptance of the bill of lading. This excuse might have had some force if they had any option, but it was the law of Texas and the United States that the carrier had the right to issue such a bill of lading. Callender & Magnus had no right to refuse to receive it." Appellant, corporation though it is, is affected with knowledge of the law; but, admitting this, we think it cannot be charged with knowledge that the propositions here made are the law. It knew that the carrier might stipulate for the benefit of such insurance as the insured had the power and right to convey; but it did not know that the insured and carrier might make a contract for it without its consent, and contrary to the express stipulation of the policy. We think it did not know that the shipper had not the right to reject the bill of lading on which appellee now bases its right, containing the clause in regard to insurance; for we understand it was the right of the shipper

to reject that bill of lading, and to have their cotton transported on one that did not contain that provision. A refusal to give the carrier the benefit of insurance already secured, would be, in effect, but a refusal to insure for the benefit of the carrier, and this a carrier cannot require as a condition on which it will receive and transport freight. If there be any question of unearned premium, it is not presented in this case. The policy having ceased to be operative, and that being the foundation of all obligation on the part of the insurance company, the certificates subsequently issued, and transferred subsequently to the loss, conferred no right on the carrier. The judgment of the Court below will be reversed, and judgment here rendered for appellant.

It is so ordered.

The consideration of the principal case involves at least four different questions: (1) The insurer's right of subrogation. (2) The insurable interest of the carrier. (3) The effect of a stipulation that the carrier shall have the benefit of the owner's insurance upon goods consigned. (4) The effect of a warranty in the policy that the insurance shall not inure to the benefit of any carrier.

1. *The insurer's right of subrogation.* —It may be accepted as settled law that an insurer, upon payment of a loss, "becomes subrogated to all the assured's rights of action against third persons who have caused, or are responsible for, the loss. No express stipulation in the policy of insurance, or abandonment by the assured, is necessary to perfect the title of the insured. From the very nature of the contract, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods, or from damages paid by third persons for the same loss:" *Phœnix Ins. Co.* v. *Erie Transportation Co.* (1886), 117 U. S. 312; S. C., 25 AMER. LAW REG. 330. "It is, as a general principle, true," says DEVENS, J., in *Jackson Co.* v. *Boylston Mut. Ins. Co.* (1885), 139 Mass. 508, "that, if goods are injured by transportation under such circumstances that the carrier and the insurer are alike liable therefor, and the insurer pays for such injury, he will be subrogated to such claim as the owner may have against the carrier. And this, apparently, because the liability of the carrier is treated as primary, while that of the insurer is secondary only. The contract of insurance being one of indemnity, the insurer, when he has indemnified the insured, is equitably entitled to succeed to the right which he had against the carrier."

The general principle stated in these cases was long since recognized in England in the cases of *Randal* v. *Cockran* (1748), 1 Ves. Sr. 98; *Mason* v. *Sainsbury* (1782), 3 Doug. 61; *Clark* v. *Inhabitants of Blything* (1823), 2 B. & C. 254; *Yates* v. *Whyte* (1838), 4 Bing. N. C. 272. Following the English decisions, Chief Justice SHAW held, in *Hart* v. *Western R. R. Corporation* (1847), 13 Met. (Mass.) 99, that an in-

surance company, having paid a fire loss, occasioned by sparks negligently communicated to the insured property from a railroad company's locomotive, was subrogated to the insured's right of recovery against the railroad. The principle was again applied by Chief Justice GIBSON, in *Gales* v. *Hailman* (1849), 11 Pa. 515, to the case of goods lost while in the custody of a common carrier. In both of these cases it was held that the action must be in the name of the shipper, who, to the extent of the indemnity received by him from his insurance, sues as trustee for the insurer. The carrier cannot set up the payment made by the insurer, as satisfaction, in whole or in part, of the claim, nor can he call upon the insurer for contribution. These decisions were followed by the Supreme Court of the United States in the case of goods destroyed by accidental fire, while in course of transportation by a common carrier: *Hall* v. *Nashville & C. R. R. Co.*, 13 Wall. (80 U. S.) 367, where the right of the insurer to subrogation, admitted on the argument to prevail in cases of marine insurance, was held to apply equally to cases of fire insurance upon land. The general principle was again recognized in *The Potomac* (1881), 105 U. S. 630, and in *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* (1889), 129 Id. 397.

In England the early decisions have been consistently followed: *White* v. *Dobinson* (1844), 14 Sim. 273; *Dickenson* v. *Jardine* (1868), L. R. 3 C. P. 639; *Simpson* v. *Thomson* (1877), L. R. 3 App. Cas. 279; *Quebec Fire Assr. Co.* v. *St. Louis* (1851), 7 Moo. P. C. 286; *Darrell* v. *Tibbitts* (1880), L. R. 5 Q. B. D. 560. The two cases last cited arose out of contracts of fire insurance.

Other cases in which the doctrine of subrogation has been recognized as applying to rights of action against wrongdoers, for damages done to property which is the subject of insurance, are: *Rockingham Mut. Fire Ins. Co.* v. *Bosher* (1855), 39 Me. 253; *Bean* v. *Atlantic & St. L. R. R. Co.* (1870), 58 Id. 82; *Connecticut Mut. Life Ins. Co.* v. *New York & N. H. R. R. Co.* (1856), 25 Conn. 265; *Peoria M. & F. Ins. Co.* v. *Frost* (1865), 37 Ill. 333; *Monmouth County Mut. Fire Ins. Co.* v. *Hutchinson* (1870), 21 N. J. Eq. 107; *Connecticut Fire Ins. Co.* v. *Erie Ry. Co.* (1878), 73 N. Y. 399; *Platt* v. *Richmond, Y. R. & C. R. R. Co.* (1888), 108 Id. 358; *Swarthout* v. *Chicago & N. W. Ry. Co.* (1880), 49 Wis. 625; *Hustisford Farmers' Mut. Ins. Co.* v. *Chicago, M. & St. P. Ry. Co.* (1886), 66 Id. 58. The only case which denies subrogation to the insurer is *Carroll* v. *New Orleans, J. & G. N. R. R. Co.* (1874), 26 La. An. 447, which was the decision of a divided Court, and has not been reaffirmed. The facts of that case were very similar to those of the principal case, the action being against a common carrier for the value of cotton destroyed by fire while in transit. In his dissenting opinion, TALIAFERRO, J., says: "I am clearly of the opinion the insurance company stands subrogated by law to all the rights of the owners against the carriers, as they certainly are upon general principles of equity." In the case of *Hartford Ins. Co.* v. *Pennell* (1878), 2 Bradw. (Ill.) 609, the Court went so far as to restrain the insured, at the suit of the insurers, who had paid him the loss, from making a settlement of his claim against the alleged wrong-doer.

When the insurer, by reason of the payment of the loss, has become subrogated to the rights of the insured, he may recover, in a suit against the carrier, brought in the name of the insured, the full amount of the loss or damage, without regard to the amount of the policy of insurance: *Mobile & M. R. R. Co.* v. *Jurey* (1883), 111 U. S. 584. And in such a suit the carrier cannot defend on the ground that the

insurer has failed to interpose a defense, which might have been successfully made to the claim upon the policy: *Sun Mut. Ins. Co.* v. *Mississippi Valley Transp. Co.* (U. S. C. Ct., E. D. Mo., 1883), 17 Fed. Repr. 919.

2. *Insurable interest of the carrier.*— A common carrier has an insurable interest in the goods carried for hire by him: *Buck* v. *Chesapeake Ins. Co.* (1828), 1 Pet. (26 U. S.) 151; *Crowley* v. *Cohen* (1832), 3 B. & Ad. 478; *London & N. W. Ry. Co.* v. *Glyn* (1859), 1 E. & E. 652; *Van Natta* v. *Mut. Security Ins. Co.* (1849), 2 Sandf. (N. Y.) 490; *Chase* v. *Washington Mut. Ins. Co.* (1852), 12 Barb. (N. Y.) 595; *Savage* v. *Corn Exchange Fire & I. N. Ins. Co.* (1858), 1 Bosw. (N. Y.) 1; *Eastern R. R. Co.* v. *Relief Fire Ins. Co.* (1868), 98 Mass. 420; *Commonwealth* v. *Hide and Leather Ins. Co.* (1873), 112 Id. 136; *Jackson Co.* v. *Boylston Mut. Ins. Co.* (1885), 139 Id. 508. "It is well settled that an insurable interest, in mercantile language, does not necessarily import an absolute right of property in the thing insured. A special or qualified interest is equally the subject of insurance; and it has often been determined that each distinct interest in the same subject may be protected by a separate policy on the subject, for the party interested in it. The mortgagor and mortgagee may both insure; so may the trustee and the *cestui que trust;* and so may every party who has any special interest to protect, or who represents the property as the qualified owner of it:" *De Forest* v. *Fulton Fire Ins. Co.* (1828), 1 Hall (N. Y.) 84. This case, in which the principles involved were most elaborately considered and which has always been recognized as a leading authority, determined the right of a commission merchant to insure goods consigned to him for sale. But its reasoning is equally applicable to the case of a carrier. Indeed, the carrier's interest is greater than that of a commission merchant, for the carrier has not only a lien upon the goods for his transportation charges, but he is absolutely liable, as an insurer, to the owner for their safe delivery, unless destroyed by the act of God or the enemy of the country: *Chase* v. *Washington Mut. Ins. Co.*, *supra*. If the carrier should recover from the insurer an amount larger than his interest in the goods, he would hold the excess as trustee for the owner: *De Forest* v. *Fulton Fire Ins. Co.*, *supra;* Wood on Fire Insurance, § 514.

3. *Effect of stipulation that the carrier shall have the benefit of the owner's insurance.*—The first case in which the effect of such a stipulation in a bill of lading was considered, was *Mercantile Mut. Ins. Co.* v. *Calebs* (1859), 20 N. Y. 173, which is cited in the principal case. This was a case of inland marine insurance. The underwriters brought suit against the carriers for the value of goods insured by the latter and lost while in course of transportation, and the carriers set up in defence to the action a stipulation in the bill of lading giving them "the benefit of any insurance by or for account of" the owners and insured. The Court (ALLEN, J.) used the following language: "If there had been no special agreement between the insured and the defendants, under the facts as found, the plaintiffs would undoubtedly have been entitled to recover, if the defendants were liable for the loss of the goods. * * * The question then arises, was the special contract between the insured and the defendants a valid one? and if so, what is its effect upon the plaintiffs' right to recover? It has been frequently decided that a common carrier may, by special contract, limit, restrict, or modify, his common law liability as an insurer of the transportation of goods. In the case of *Gould* v. *Hill* (1842), 2 Hill (N. Y.) 623, a majority of the Court held otherwise,

but this Court, in *Dorr* v. *New Jersey Steam Nav. Co.* (1854), 11 N. Y. 485, held the contrary, and overruled the case of *Gould* v. *Hill;* and it had previously been repudiated in *Parsons* v. *Monteath* (1851), 13 Barb. (N. Y.) 353, and in *Moore* v. *Evans* (1852), 14 Id. 524 (see also *New Jersey Steam Nav. Co.* v. *Merchants' Bank* (1848), 6 How. (47 U. S.) 344). The Court in all these cases say that they see no reason why parties may not contract as they please in reference to the transportation of goods; that such an agreement neither changes nor interferes with any rule of law, and does not affect public morals or conflict with public interests. If the owner chooses to take upon himself part of the risk of transportation, and thereby induces the carrier to convey for a less rate of compensation, who has any right to complain? It is a matter entirely between themselves, unless it is the result of a scheme to defraud third persons. It has long been determined, both in England and in this country, that such an agreement is valid and binding, and in the absence of fraud can at all times be enforced."

The general rule here stated so broadly, although still followed in New York, has not been recognized to its full extent by other jurisdictions: *New York Cent. R.R. Co.* v. *Lockwood* (1873), 17 Wall. (84 U. S.) 357; *Ogdensburg & L. C. R. R. Co.* v. *Pratt* (1874), 22 Id. (89 U. S.) 123; *Bank of Kentucky* v. *Adams Express Co.* (1876), 93 U. S. 174; *Grand Trunk Ry. of Canada* v. *Stevens* (1877), 95 Id. 655; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* (1889), 129 Id. 397; *Forepaugh* v. *Delaware, L. & W. R. R. Co.* (1889), 24 W. N. C. (Pa.) 385. But the correctness of the ruling which sustained contracts similar to that now under consideration, has never been disputed. In *Rintoul* v. *New York Cent. & H. R. R. Co.* (U. S. C. Ct., S. D. N. Y., 1883), 17 Fed. Repr. 905; S. C., 21 Blatchf. 439, the same view of the law was taken. This case was reported in full in 23 AMER. LAW REG. 294, with a valuable annotation, in which the validity of such stipulations was discussed at length. The annotator, in concluding, expresses some doubt as to whether the rule there followed by Judge SHIPMAN was sound in principle or not. But subsequent decisions have removed all uncertainty from the question, and it must now be regarded as accepted law.

In the year 1885 two cases were decided, one in Texas and one in Massachusetts, in each of which the validity of the stipulation under discussion was affirmed. In the former case, *British & F. M. Ins. Co.* v. *Gulf, C. & S. F. Ry. Co.* (1885), 63 Tex. 475, it was said: "The right to insert such a stipulation as the present is universally admitted, or denied, if at all, only on the ground of the supposed effect it has of restricting the common law liability of a carrier. This, in our view, is not the effect of the reservation. * * * The right of the insurance company to recover against the railroad company, if it existed at all, was the result of an equitable subrogation to the remedy of the owner of the cotton against the carrier, and of the assignment made subsequent to its loss. But the assignment was worthless, as it was made in privity and subordination to the previous stipulation placed in the bill of lading; and the subrogation was of no avail, as no one can become subrogated to a right which the party originally possessing that right had previously contracted should not be enforced." In the other case, *Jackson Co.* v. *Boylston Mut. Ins. Co.* (1885), 139 Mass. 508, the Massachusetts Court places its decision upon the following grounds: "As the insurance company obtains its remedy against the carrier, not by virtue of any contract of its own with him, but through the contract of the owner of the

goods, such owner may make the contract of carriage so as to suit his own interest, provided there is no fraudulent concealment from the insurer; and the right which the insurer obtains is subject to the agreement with the carrier. Carriers have an insurable interest in the goods they transport, and may therefore effect insurance upon them for their own benefit. There is no reason why they may not insure them jointly with the owner, and, if so, why they may not contract for the benefit of insurance effected by the owner, in the absence of fraud or any contract to the contrary with the insurer. The owner is under no obligation to contract so that he shall have a remedy against the carrier under every circumstance in which the carrier has been held liable by the common law. If he may accept a receipt excusing the carrier from liability from fire, and still hold the insurer, he may also make a contract that the insurance shall be for the benefit of the carrier."

In the case just cited it was also held that the insured's contract to give the carrier the benefit of the insurance was not in violation of a condition of his policy, prohibiting the sale, assignment, transfer or pledge of such policy, or the interest insured thereby, without the written consent of the insurer. "The policy and interest in it are still retained by the owner; it is neither transferred nor pledged. There is a collateral agreement only, that the carrier, having incurred a liability, shall have the benefit of the insurance that may have been effected:" *Jackson Co.* v. *Boylston Mut. Ins. Co.*, *supra*.

As stated in the principal case, the validity of contracts such as the one in question was recognized in *Tate* v. *Hyslop* (1885), L. R. 15 Q. B. D. 368, which was a case of marine insurance. The insurer was accustomed to charge a higher rate of premium upon shipments under contracts giving no recourse against the carrier, except for negligence. This practice was known to the insured, who failed, however, to inform the insurer that he had entered into such a contract. His concealment of this fact was held to have been fraudulent and to have vitiated his policy.

The Supreme Court of the United States in the case, already cited, of *Phoenix Ins. Co.* v. *Erie Transportation Co.* (1886), 117 U. S. 312; S. C., 25 AMER. LAW REG. 330, have adopted and followed the rule stated in the foregoing decisions. The reasons for so doing are thus clearly given in the opinion of GRAY, J.: "The insurer stands in no relation of contract or of privity with such persons (*i.e.*, the carriers). His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter. In a court of common law, it can only be asserted in his own name, and, even in a court of equity or of admiralty, it can only be asserted in his right. In any form of remedy, the insurer can take nothing by subrogation but the rights of the assured * * * . The right of action against another person, the equitable interest in which passes to the insurer, being only that which the assured had, it follows that, if the assured has no such right of action, none passes to the insurer; and that, if the assured's right of action is limited or restricted by lawful contract between him and the person sought to be made responsible for the loss, a suit by the insurer, in the right of the assured, is subject to like limitations or restrictions." The doctrine of this case was recognized very recently in *Liverpool & G. W. Steam Co.* v. *Phoenix Ins. Co.* (1889), 129 U. S. 397.

The latest consideration of the question, with the exception of the principal case, was by the Court of Appeals of New York in *Platt* v. *Richmond, V.*

*R. & C. R. R. Co.* (1888), 108 N. Y. 358. The Court there expressly adopt the reasoning of Justice GRAY, just quoted. It may, therefore, be now regarded as settled law, that a stipulation, giving a common carrier the benefit of the shipper's insurance, is valid, and that such a stipulation will operate to defeat any claim to damages on the part of the insurer, either by right of subrogation or by express assignment, for the reason that the insurer, in either case, takes only the rights of the insured, subject to all his lawful engagements and the limitations and restrictions of his contract.

In *The Sidney* (U. S. C. Ct., S. D. N. Y., 1885), 23 Fed. Repr. 88, it was held, that it was not even necessary that the stipulation should be inserted in the bill of lading, but that it would "be equally valid when clearly proved to exist by extrinsic evidence." This case is cited with apparent approval in *Phœnix Ins. Co.* v. *Erie Transportation Co., supra.*

The existence of such a stipulation in the bill of lading will not, however, operate as a defense to an action by the owner, when it does not appear that he has actually realized anything from his insurance: *Inman* v. *South Carolina Ry. Co.* (1889), 129 U. S. 128.

4. *Effect of warranty that the insurance shall not inure to the benefit of any carrier.*—From the foregoing review of the course of the decisions, it will be seen that a common carrier is now able to entirely defeat the insurer's right of subrogation, by the insertion in its bill of lading of a stipulation giving it the benefit of the insurance. The practical operation of this principle imposes upon the insurer the payment of all losses by fire, suffered by goods in course of transportation, and the carrier is protected, to the extent of the insurance, without having made any contract with the insurer or paid any premium for the policy. To restore themselves to the position which they occupied before such stipulations had been devised, insurance companies have inserted in their policies warranties that the insurance shall not inure to the benefit of any carrier. The validity and effect of such a warranty were considered in the principal case, where the question appears to have directly arisen for the first time. The principles involved have, however, been several times the subjects of adjudication.

In the case of *Carstairs* v. *Mechanics' and Traders' Ins. Co.* (U. S. C. Ct., D. Md., 1883), 18 Fed. Repr. 473, there was a stipulation in the policy that the insurer, in case of loss, should be subrogated to all claims against the transporter of the merchandise insured. The insured contracted to give the carrier the benefit of the insurance. The goods were lost while in transit and the insurance company defended to the claim of the insured, on the ground that by his contract with the carrier he had defeated the right of subrogation, and rendered impossible the performance of the stipulation in his policy. The Court (MORRIS, J.) sustained this position, saying: "If the plaintiffs should recover in this suit compensation from the insurance company, the agreement in the bill of lading, if valid, has made it impossible for them to do what, by both the printed and the written clauses of the policy, they agreed to do, namely, to subrogate the insurance company to their claim against the carrier. They have, in effect, agreed with the insurance company to subrogate it to their claim against the railroad, and have also agreed with the railroad to subrogate it to any claim they may have against the insurance company * * * . The insurance company, being practically in the position of a surety, and having a right to the subrogation, and the plaintiffs having, by the terms of the bill of lad-

ing under which they claim the goods, defeated that right, they cannot be allowed to recover in this action."

The same question was involved in the case of *Inman* v. *South Carolina Ry. Co.* (1889), 129 U. S. 128, which was an action by the shipper against the carrier to recover for goods lost by fire, while in course of transportation. The carrier alleged, in defence, that it had not received the benefit of the plaintiff's insurance on the goods, as stipulated in the bill of lading. It appeared that none of the insurance had been paid by the companies, and that all the policies provided for the transfer e owner's claim against the carrier to the insurer on payment of the loss, and that some of them contained further provisions forfeiting the insurance, in case any agreement was made by the insured whereby the insurer's right to recover from the carrier was released or lost. It was held by FULLER, C. J., that the insured could have recovered upon his policies only "upon condition of resort over against the carrier, any act of the owner's to defeat which operated to cancel the liability of the insurers; they (the policies) could not, therefore, be made available for the benefit of the carrier."

The principle of these cases was again recognized in *Phenix Ins. Co.* v. *Parsons* (1889), 56 N. Y. Super. Ct. 423, an action upon a policy of marine insurance.

In two recent decisions of the Supreme Court of Pennsylvania, the effect of stipulations requiring the assignment to the insurer of the insured's cause of action, is strikingly illustrated. A trustee had procured insurance upon a building belonging to the trust estate in two different companies. One policy provided that, "when this company shall claim that the fire was caused by an act or omission of any person, town or corporation, which created a cause of action, the party to whom the loss is payable under this policy, shall, on receiving payment, assign to this company such cause of action." The other contained no such provision. The property insured was damaged by fire, originating from a gas explosion, which was chargeable to the negligence of the gas company, giving the owner a right of action against the latter. Before payment upon the policies, the owner settled with and released the gas company from all claims arising out of the explosion, the release stipulating that it was not to affect the claims of the owner against the insurance companies. He then brought suit upon his policies. It was held, in the case of the policy which contained the condition requiring an assignment of the insured's cause of action, the opinion being by WILLIAMS, J., that the release of the gas company, which made "performance of the covenant to assign either impossible or useless, would relieve the insurance company of its concurrent covenant to pay:" *Niagara Fire Ins. Co.* v. *Fidelity Title and Trust Co.* (1889), 123 Pa. 516. On the other hand, where there was no express covenant to assign, the mere existence of the equitable right of subrogation would give the insurer no claim to substitution until the liability had been discharged. Therefore, in the latter case, the release of the wrong-doer would not constitute a defense to the claim of the insured upon his policy: *Ins. Co. of North America* v. *Easton* (1889), 123 Pa. 523.

The authorities cited appear to establish the doctrine that, where the owner of goods in transit contracts both to give the carrier the benefit of his insurance and also to assign to the insurer his cause of action against the carrier, he forfeits all claim upon his policy, but may still recover against the carrier. The principal case extends this doctrine to policies in which it is warranted that

the insurance shall not inure to the benefit of any carrier. In either case the carrier may, of course, be protected by taking out a policy directly upon its own interest in the goods.

It will be noticed that the policy in the principal case, antedated the contract of carriage. Whether a similar warranty, in a policy issued subsequently to the date of the bill of lading, would have the same force, yet remains to be decided. The principles laid down in the various decisions here considered, would seem, however, to require an affirmative answer to this question.

A novel question, involving some of the subjects under discussion, arose in *Kidd* v. *Greenwich Ins. Co.*, C. Ct. U. S., S. D. N. Y. (1888), 35 Fed. Repr. 351. The insurance was upon certain barrels of spirits and covered the excess of value above $20 per barrel, less a stipulated amount to be deducted in lieu of average. The policy provided that the insured, by accepting payment, would assign and transfer to the insurer all his claim, by reason of the loss, against the carrier or others, to the extent of the amount paid him, and that any act of the insured, waiving or tending to defeat or decrease any such claim, whether before or after the insurance, would operate to cancel the policy. The insurer entered into an agreement with the carrier that the spirits should be carried at a stipulated valuation of $20 per barrel, the actual value being over $97. The goods were burned while in transit, and the owner received from the carrier payment at the rate of $20 per barrel. He then brought suit against the insurance company for his loss in excess of that amount. Defense was made on the ground that, under the provisions of the policy which have been cited, the agreement to restrict the carrier's liability rendered the contract of insurance void. But the Court (WHEELER, J.) held that these provisions of the policy did not mean "that all liability of the carrier, which might arise, shall be insisted upon and created and not diminished from what it would be without special contract, but that the claim against the carrier, as it actually exists in favor of the insured, shall not be waived or diminished, and shall inure to the benefit of the insurer. The policy does not provide that any liability of the carrier shall be perfected, but that, if one is perfected, it shall remain for the benefit of the insurer." Recovery was, therefore, allowed. In view of the later decisions, cited above, the soundness of this rule must be considered doubtful.

JAMES C. SELLERS.

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*Supreme Court of Michigan.*

## BURTON v. TUITE.

A statute declared that the custodians of municipal records should furnish proper and reasonable facilities for the inspection and examination of the records and files in their respective offices, to all persons having occasion to examine them for any lawful purpose, and also for making memoranda or transcripts therefrom during business hours. *Held*, that under this statute, a person making and dealing in abstracts of title has the right to examine the tax sales books in the city treasurer's office.

The receiver of taxes in Detroit makes up an annual statement of his sales for unpaid taxes and delivers it to the city treasurer, who notes therein such redemptions as may be made, or the sale of any tax-bids. This statement is not one that